### B. Description of the Transaction

Cingular seeks Commission approval of transfer applications that would allow AWS to become an indirect wholly-owned subsidiary of Cingular. At the time of the merger, each share of stock of AWS will be converted into a right to receive cash (either pursuant to the merger or through the Delaware appraisal proceeding) and then cancelled.[9]

Given the structure of the transaction, there will be no adverse impact on AWS subscribers. These subscribers entered into contracts with AWS and that relationship will continue unchanged. AWS will continue in existence, but as an indirect wholly-owned subsidiary of Cingular. Thus, there is no need to "transition" customers to Cingular.

### C. Standard of Review

Under Sections 310(d) and 214 of the Communications Act of 1934, as amended, the subject licenses may not be transferred unless the Commission finds "that the public interest, convenience and necessity will be served thereby."[10] The scope of review is as follows:

> Any [transfer] application shall be disposed of as if the proposed transferee . . . were making an application under Section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer . . . of the permit or license to a person other than the proposed transferee.[11]

As a threshold matter, in evaluating transfer applications under Section 310(d), the Commission normally reviews whether the transferor and transferee are qualified to hold Commission licenses. As noted above, the Commission repeatedly has affirmed the qualifications of each Applicant.

The public interest analysis involves a review of the benefits of the transaction. It incorporates an analysis of whether the proposed transaction presents any significant anticompetitive issues and, if so, whether there are countervailing pro-competitive effects or other public interest benefits.[12] This determination requires both an evaluation of competitive

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9 As a result, DoCoMo's ownership interest in AWS will be extinguished.

10 47 U.S.C. § 310(d).

11 *Id.*

12 *See, e.g., Global Crossing Ltd. (Debtor-in-Possession), Transferor, and GC Acquisition Limited, Transferee, Applications for Consent to Transfer Control of Submarine Cable Landing Licenses, International and Domestic Section 214 Authorizations, and Common Carrier and Non-Common Carrier Radio Licenses, and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, Order and Authorization*, 18 F.C.C.R. 20301, 20315-16 (IB, WTB, WCB 2003) ("*Global Crossing Order*"); *Applications of Voicestream Wireless Corporation, Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act,* 16 F.C.C.R. 9779, 9789 (2001) ("*VSTR/DT Order*"); *AT&T Corp., British Telecommunications, plc, VLT Co. LLC, Violet License Co. LLC, and TNV (Bahamas) Limited,* (continued)

effects and a broader public policy analysis.[13] The Commission also "must determine whether the transaction violates [FCC] rules, or would otherwise frustrate implementation or enforcement of the Communications Act and federal communications policy."[14]

## II. THE PROPOSED TRANSACTION WILL SERVE THE PUBLIC INTEREST

Commission approval of the transfer of control applications will promote the public interest. In the current wireless marketplace, consumers demand: (1) high quality voice transmission (few dropped calls and high grade audio); (2) advanced high-speed data applications; and (3) nationwide coverage (*i.e.,* few coverage gaps and no roaming charges).[15] The merger would permit the combined company to satisfy these customer needs more quickly than either company alone.

- First, because the transaction increases network capacity and provides the spectrum and compatible network resources to fill in the coverage holes of both companies, consumers will enjoy significant near-term improvements in service quality.
- Second, the merger will alleviate spectrum capacity constraints that currently hinder the growth of Cingular and AWS, as well as their ability to provide 3G services. The combined company will be able to deploy 3G service in more areas, including rural areas, and with less disruption than either company could do on its own.
- Third, approval of the transaction will expand significantly the facilities-based footprint of Cingular to reach 97 of the top 100 metropolitan areas.
- Fourth, the merger will create economies of scale and scope that will make Cingular a more effective competitor.
- Finally, the transaction will improve homeland security and public safety.

Absent the merger, these benefits cannot be achieved without substantial delay, if at all.

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(footnote continued)

*Applications for Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc, Memorandum Opinion and Order*, 14 F.C.C.R. 19140, 19147 (1999) ("*AT&T/BT Order*"); *Motient Services Inc. and TMI Communications and Company, LP, Assignors, and Mobile Satellite Ventures Subsidiary LLC, Assignee, Order and Authorization*, 16 F.C.C.R. 20469, 20473 (IB 2001).

13 *Global Crossing Order*, 18 F.C.C.R. at 20315; 47 U.S.C. § 157(a).

14 *General Motors Corporation and Hughes Electronics Corporation, Transferors and the News Corporation Limited, Transferee, for Authority to Transfer Control, MB Docket No. 03-124, Memorandum Opinion and Order*, FCC 03-330 (rel. Jan. 14, 2004).

15 Lefar Declaration at 2.

### A. The Transaction Will Result in Service Quality Improvements for Consumers

The ability of Cingular and AWS to improve quality, offer new services, and deploy new technologies has been hampered by the amount of spectrum each holds. Both Cingular and AWS operate cellular and PCS systems and, consistent with the Commission's rules, their cellular systems must provide analog service.[16] As demand for wireless service increased, the original cellular carriers were forced to deploy next generation digital technologies that would increase capacity. The predecessors of Cingular and AWS were among the first to deploy second generation ("2G") digital technologies.[17] At that time, TDMA was the most viable 2G option – GSM was not available in the U.S. on 850 MHz cellular frequencies and CDMA was unavailable for commercial deployment.[18]

In the 1990s, consumers began demanding new applications from cellular carriers. These applications – like text messaging and elementary (non-graphics intensive) web browsing – created bandwidth demands that could not be satisfied with TDMA technology without compromising the quality and capacity available for traditional voice services. To accommodate the anticipated demand for traditional wireless telephony and new data services, Cingular and AWS evaluated next generation technologies. Unfortunately, TDMA offered no realistic migration path to third generation ("3G") technology.[19] Thus, carriers like Cingular and AWS had to develop a transition to a brand-new 3G technology. The transition required each company to deploy a third separate network as an overlay.[20]

For a variety of reasons, both AWS and Cingular selected the GSM standard for this overlay. GSM has the benefit of being the global standard for interconnected mobile voice services and offers a simple migration path for meeting the demand for new services during the conversion to a true 3G network. This transition plan enabled Cingular and AWS to meet demand for new medium-speed data services by deploying the General Packet Radio Services ("GPRS") 2.5G technology, followed by the deployment of Enhanced Data Rates for GSM Evolution ("EDGE") as an initial 3G ("3G Light") technology.[21] These technologies permit the transmission of data at rates up to 115 kbps for GPRS and up to 470 kbps for EDGE.[22] Neither technology was a viable option for TDMA networks.[23]

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16 The Commission's rules require that analog service remain available on these systems until February 18, 2008. *See* 47 C.F.R. § 22.901(b).

17 Hogg/Austin Declaration at 3.

18 *Id.*

19 *See id.* at 4-5.

20 *Id.* at 4-7.

21 *Id.* at 5-7.

22 *Id.* at 5; *see Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14804.

23 As discussed in the Hogg/Austin Declaration: "EDGE was originally seen as the evolutionary path to 3G for TDMA networks, but EDGE was more closely related to GSM. Given the relatively low global penetration of TDMA compared to GSM and CDMA, vendors' concentrated their development efforts on GSM 3G migration as compared to TDMA 3G migration, and TDMA development efforts ultimately, faltered completely. Moreover, the (continued)

By deploying a GSM overlay, however, Cingular and AWS have been forced to divide their spectrum in order to effectively run three separate networks in many areas – analog, TDMA, and GSM networks.[24] Both companies also use spectrum from two frequency bands – 850 MHz (cellular) and 1900 MHz (PCS) – which adds further complexity. Thus, only a portion of each carrier's spectrum is available for calls made by phones utilizing each of these distinct technologies. Other national carriers such as Sprint and T-Mobile do not face this problem because they do not have to comply with an analog service requirement and they only have to support a single 2G technology.[25]

In urban areas where Cingular provides cellular service, a typical system currently uses about 4 MHz (six voice channels per site in a 4-cell reuse pattern) to comply with analog service requirement and about 11 MHz (including a guardband between TDMA and GSM) to provide TDMA service, leaving about 10 MHz for Cingular's provision of GSM service, including GPRS/EDGE.[26] Thus, Cingular only has a limited ability to improve quality without degrading some other aspect of its network operation.[27] AWS faces similar constraints.[28]

Cingular already has taken a step forward in addressing its geographic and spectrum limitations by acquiring spectrum from NextWave. Even when the NextWave transaction closes,[29] however, Cingular will hold 25 MHz or less of spectrum in a majority of the top 50 MSAs, including some where it will have no spectrum at all.[30] In addition, even with the acquisition of NextWave spectrum in markets where Cingular does not operate a 1900 MHz system, Cingular would face an extended process of finding new sites and constructing a new

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(footnote continued)
substantial delay before EDGE services would be available meant that there would be a considerable time before TDMA-based networks would be able to offer data communications at the necessary increased speed levels. Given the expected demand for increasingly fast data services, the vendors' inability to deliver TDMA-based 3G services was one of the factors that led them to discontinue efforts to develop TDMA-based 3G services and capabilities." Hogg/Austin Declaration at 5.

24 Although Cingular expects to complete its roll-out of GSM services this summer, it still must maintain a TDMA network for its TDMA subscribers for the foreseeable future, and the Commission's rules require Cingular to continue providing analog service until February 18, 2008. *See* 47 C.F.R. § 22.901(b).

25 The analog service requirement contained in Section 22.901(b) of the Commission's rules only applies to *cellular* systems (*i.e.,* those operating at 850 MHz), and neither T-Mobile nor Sprint holds such licenses. Although Verizon is subject to this requirement in some markets, it does not have to maintain multiple digital networks, because it uses only CDMA as its 2G technology. *See* Hogg/Austin Declaration at 3, 25-26.

26 *Id.* at 7-8. The precise allocation of spectrum varies from area to area. *Id.*

27 *Id.* at 7, 12-13. When designing or modifying a system, capacity, quality, and coverage are interdependent – if capacity is increased without adding spectrum, quality and coverage are detrimentally affected. *Id.* at 13.

28 *See* Slemons Declaration at 1-3; *see also* Hogg/Austin Declaration at 12-13.

29 *See generally Cingular/NextWave.*

30 Hogg/Austin Declaration at 7.

network. This time to market will be substantially shortened by the combination of spectrum and network assets held by Cingular and AWS.

Cingular has struggled to keep up with the other nationwide and near national CMRS carriers. In addition to lagging behind Verizon and Nextel in terms of coverage footprint, Cingular ranked third in a J.D. Power survey regarding network quality.[31] Consumer Reports noted that "Cingular and AT&T subscribers suffer from overloaded circuits in several major cities."[32] Without additional spectrum and infrastructure, both companies would find it challenging to provide customers with the quality and advanced services they desire. The merger will allow Cingular to address these issues far more expeditiously than it could on a stand-alone basis.

With the additional spectrum involved in this transaction, network capacity, quality, and coverage can all be improved.[33] Indeed, improvements often will be disproportionately advantageous in comparison to the spectrum added. For example, trunking communication channels together leads to a nonlinear increase in capacity and improvement in service quality. Two channels trunked together can provide 0.223 Erlangs[34] of capacity at 2% blocking, while four channels trunked together can provide 1.09 Erlangs of capacity at the same blocking rate, which is more than double the capacity of two two-channel blocks, an increase in efficiency (*i.e.*, Erlangs per channel) from 11% to 27%.[35] This is true because the caller is more likely to find a vacant channel when a larger number of channels are pooled together in a trunk group.

Trunking efficiencies also will produce a significant improvement in service quality. As noted in the Hogg/Austin Declaration:

> a typical cell site in an urban area will have about 40 trunked channels per sector, with a capacity of 31 Erlangs at 2% blocking. If Cingular and AWS have sites that can be combined and operated as a single 80-channel trunk group instead of two 40-channel trunk groups, there would be an increase in total capacity from 62 Erlangs to 68.7 Erlangs at 2% blocking. As a result, if at a given

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31 *See* Peter Valdes-Dapena, *How's Your Cell Service Rate?*, CNN/MONEY, July 31, 2003, *at* http://money.cnn.com/2003/07/31/technology/cellular_survey.

32 *Cingular Priority: Improving Customer Satisfaction*, ASSOCIATED PRESS, Feb. 19, 2004 (citing Feb. Consumer Reports survey).

33 Hogg/Austin Declaration at 14-15.

34 "Communications traffic is often measured in Erlangs, representing call-hours during a given period, typically the busiest hour of the day. A single call 60 minutes long, 20 three-minute calls, and assorted calls of varying length totaling 60 minutes, would each represent one Erlang of traffic." *Id.* at 14 n.14.

35 *See id.* at 14. The illustrative computations above use the Erlang B formula for calculating the effects of trunking, premised on unsuccessful call attempts being blocked on the first try. Under this formula, an increase in number of channels produces a greater than proportional increase in capacity at the same blocking rate, or a greater than proportional decrease in blocking rate for the same number of call attempts, in both cases reflecting an increase in efficiency. *Id.* at 14 n.15.

> site and sector AWS and Cingular each had 40 voice channels deployed at the site and serve the same number of subscribers at the same quality level, the combination of their 80 channels into a single trunk group will provide a 10.8% increase in capacity for serving new traffic at the same quality level as before. Until that traffic is added, the increased efficiency would serve the same level of traffic at an even higher quality level (lower rates of blocked and dropped calls). Alternatively, the efficiency gain could be used to reduce the number of channels needed to accommodate the combined traffic. In the example, the total number of voice channels could be reduced from 80 (in two separate trunk groups) to 73 (in a combined system) to serve the combined customer base with no reduction of the existing quality level, thereby recovering 7 channels for alternative uses, *e.g.*, GSM.[36]

As a result, consumers will quickly experience improved service quality, such as a reduction in blocking and dropped calls during peak call hours.[37] The combined networks of the two companies also will close dead spots within many cities and coverage gaps in many rural areas, which will provide more seamless calling with higher quality.[38] By combining the two networks, Cingular will be able to address quality concerns by improving capacity and enhancing coverage in problematic areas. "Significantly increased spectrum and more sites means clear calls, fewer dropped calls and broader availability of coverage."[39]

Dropped calls are an important factor in customers' perception of service quality and the merger will give the combined company the capability to better serve customers through improvements in service quality.[40] If the systems being combined in a given area are equally loaded, dropped calls could be reduced by up to 20%, but if one system is more highly loaded than the other, customers of the system with higher usage would see an improvement of up to 40% in dropped calls without any decrease in service quality received by customers of the less congested system.[41] The attached Hogg/Austin Declaration demonstrates the service improvements in detail.[42] For example, they include graphs demonstrating[43] – based on actual market data – that when the two systems are combined, blocked and dropped call rates will improve, in some cases dramatically. As the graphs (reproduced below) show, combining

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36 *Id.* at 15 (footnotes omitted).

37 *See id.* at 15-18; McGaw Declaration at 6.

38 Hogg/Austin Declaration at 22-25; *see* McGaw Declaration at 5; Sievert Declaration at 3.

39 Jane Spencer and Andrea Petersen, *AT&T-Cingular Merger to Affect One in Three Wireless Users; Sprint Counters With New Plan*, WALL ST. J., Feb. 18, 2004, at D1 (Quoting Marc Lefar, Cingular's Chief Marketing Officer); *see* Hogg/Austin Declaration at 13-18.

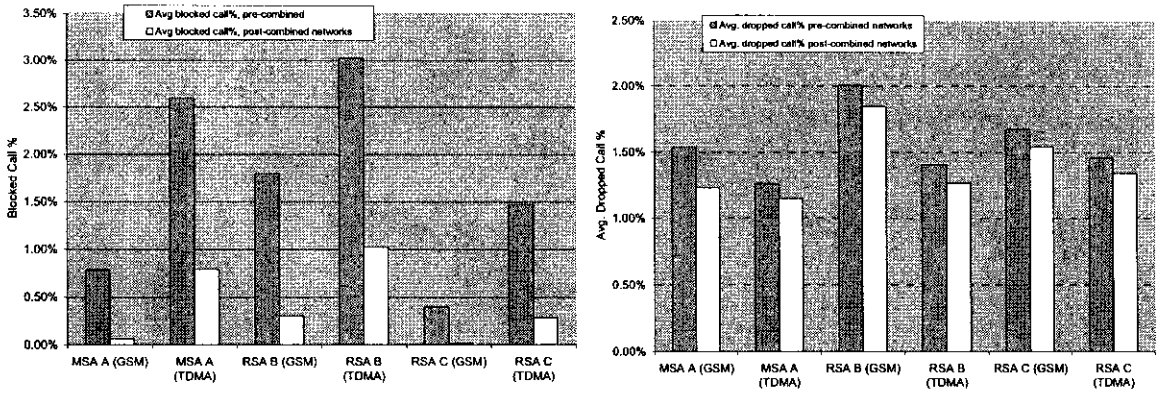
40 Hogg/Austin Declaration at 16 & n.18.

41 *Id.* at 16 & Appendix 4.

42 *See id.* at 15-19.

43 *Id.* at 17, Figures 4-5.

systems can reduce the percentage of blocked calls well below the pre-merger level. The percentage of dropped calls is reduced as well:




Mr. Hogg and Dr. Austin demonstrate that in one of the metropolitan areas currently served by both companies, the trunking efficiencies resulting from combining two identical systems could result in a reduction in blocked calls by more than 180,000 calls per day or, put another way, about 66,000,000 calls annually.[44] The improvements in blocking also would be felt in rural areas. In one RSA evaluated, the TDMA blocking rate was reduced from 3% to 1% which, in turn, eliminated blocking for some 10,000 calls per day — over 3,000,000 calls in the space of a year.[45] While these figures are based on certain assumptions, they indicate the order of magnitude of the consumer benefits of the merger, which will occur not just in a few special cases but will generally occur wherever Cingular and AWS networks are combined.[46] "Nationwide, hundreds of millions of calls would be favorably affected per year."[47]

Absent the merger, the ability of either Cingular or AWS to improve quality and roll out new services is limited. In both urban and rural areas, for example, it is becoming increasingly difficult to improve quality by splitting existing cells, because there are limits on how many towers can be built.[48] To split cells, a company must find a tower location with the right coverage and then address zoning, environmental, and political issues merely to have the right to build the tower.[49] This is both time-consuming and costly; as a result cell-splitting has only limited utility in improving coverage, quality, and capacity in mature networks.[50]

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44 *Id.* at 18.

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.* at 21 n.25, 23 n.28; *see* McGaw Declaration at 7.

49 *See* Hogg/Austin Declaration at 21 n.25, 23 n.28; McGaw Declaration at 7.

50 *See* Hogg/Austin Declaration at 21 n.25, 23 n.28. In addition to minimizing the need for cell splitting and new towers due where AWS networks have complementary sites, the merger invariably will result in an elimination of redundant sites where additional capacity is not necessary. Thus, the combined company will retain the sites that provide the best and most efficient coverage and free up space on the other towers for third party collocation. *See id.* at 24-25.

In addition to the benefits derived from the availability of more spectrum, the merger will expand the size of Cingular's footprint and reduce its reliance on roaming networks which has prevented the company from exploiting fully the technological enhancements available over its new GSM networks.[51] New features and services – such as mobile-to-mobile calling and push-to-talk capabilities – are not as attractive to consumers based on Cingular's current footprint as they would be if available more broadly.[52] The combination of AWS and Cingular will allow the availability of these services on a seamless, nationwide basis far more promptly than can otherwise be achieved, if they could be achieved at all, by the companies individually.

In many rural areas where one company provides cellular service and the other provides PCS, customers will experience improvements in service quality. Cellular signals at 850 MHz typically have coverage that extends further from population centers and highways than 1900 MHz PCS systems.[53] Thus, 1900 MHz subscribers with dual-band phones will be able to place calls on their "home" network in areas where they previously would have roamed.[54] Consequently, these subscribers will be able to receive all of the features associated with a home system rather than the more limited menu of features available while roaming.[55]

### B. The Proposed Merger Will Further the Public Interest by Alleviating Spectrum Constraints Currently Precluding the Rapid Deployment of Advanced Services

Consumer demand for new, high speed/bandwidth, advanced services is growing tremendously. Growth rates for data services dwarf the growth of wireless voice services.[56] Cell phones are no longer used just for talking. The growth rate of 2G and 2.5G data services offered on Cingular's networks, such as interactive messaging and multimedia messaging, confirms this trend. As an illustration, the number of multimedia messages per day has increased by over 700 percent in the last six months, as shown in the following graph:

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51 Lefar Declaration at 9; *see* Dan Meyer, *Cingular Continues to Hunt for Nationwide Presence*, RCR WIRELESS NEWS, Apr. 7, 2003 ("*Cingular Continues to Hunt for Nationwide Presence*").

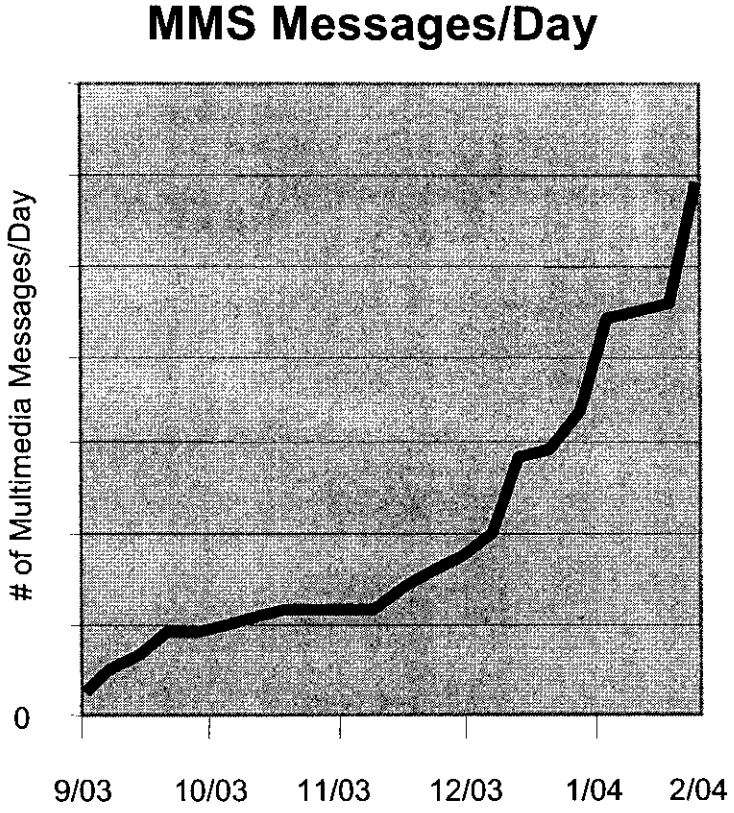
52 *See* Lefar Declaration at 10.

53 *See* Hogg/Austin Declaration at 23-24. The complementary nature of the two systems is depicted in the attached coverage maps. *See* Attachment 7.

54 *See* Hogg/Austin Declaration at 24; Slemons Declaration at 2; *see* Sievert Declaration at 4.

55 Hogg/Austin Declaration at 24; *see* Lefar Declaration at 9.

56 Lefar Declaration at 2-3; *see* Sievert at 1-2. As discussed below, Cingular's data traffic is increasing exponentially. Other countries where advanced services have been deployed show similar growth. In South Korea, for example, data accounts for 14 percent of cell phone company revenue. *See also* Yuki Noguchi and Griff Witte, *Wireless Firms Look at Phones as Limitless*, THE WASHINGTON POST, Feb. 19, 2004, at E1 ("*Wireless Firms Look at Phones as Limitless*").




These trends presage the growth rates expected when higher-speed 3G services are offered.

As one analyst noted:

> The market has moved from a regulatory driven phase where availability, pricing and services were largely defined by regulatory decisions. The next period was a marketing phase driven by price plans, acquisition and retention programs, channel activities and advertising. Finally, the market now is entering a technology driven phase where the availability of mobile data (e-mail, Internet access), base stations and mobile computing will shape the market. The move to 3G service will further continue this trend.[57]

In Europe, cell phones are used to transact business, much like an ATM card.[58] In Japan, cell phones are used as portable televisions.[59] U.S. consumers are now demanding capabilities that require large amounts of bandwidth at high speeds to work properly, such as:[60]

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57 Paul Budde Communication Pty Ltd, *USA – Wireless Communications Market Overview*, 2004, at 7 *available for purchase at* http://www.budde.com.au/Reports/Contents/USA-Wireless-Communications-Market-Overview-1838.html.

58 *See Wireless Firms Look at Phones as Limitless, supra* note 56.

- streaming video;[61]
- high-speed Internet transmission;[62]
- multimedia messaging capabilities;[63]
- the delivery of pictures over cell phones;[64]
- high-end gaming (such as real-time multiplayer games);[65]
- music offerings;[66] and
- location-based services.[67]

Cingular and AWS currently use data transmission technologies such as GPRS and EDGE that are unable to accommodate all of these demands. Competitors have begun deploying other 3G technologies that are capable of satisfying them. For example, Verizon Wireless currently offers the CDMA-based 1xEV-DO "BroadbandAccess" data service in the Washington, D.C. and San Diego, California areas, with a maximum speed of 2.4 Mbps and average end-user speeds of 300-500 kbps, and has announced plans to introduce this service nationally, starting in "many major U.S. cities" this summer.[68] Sprint is moving forward with deployment of an even more advanced service – 1xEV-DV – that also will offer consumers much faster data transmission (3.09 Mbps maximum, 400 kbps to 1 Mbps average) than currently available over either the Cingular or AWS networks.[69] To illustrate the differences in the capabilities of the technologies, a 1 megabyte file would take almost seven minutes to

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(footnote continued)

59 *Id.*

60 Lefar Declaration at 3; *see* Hogg/Austin Declaration at 4, 25; McGaw Declaration at 7. Cingular currently offers camera phones (such as the Motorola V400) and phones integrated with mp3 players (such as the Nokia 3300 Music Phone).

61 Hogg/Austin Declaration at 4, 25; McGaw Declaration at 7.

62 *See* Yuki Noguchi and Griff Witte, *Cingular Wins the Bidding*, THE WASHINGTON POST, Feb. 18, 2004, at E1 ("*Cingular Wins the Bidding*").

63 *See* Hogg/Austin Declaration at 4, 25; McGaw Declaration at 7.

64 *See Cingular Wins the Bidding, supra* note 62.

65 *See* Hogg/Austin Declaration at 4.

66 *See* McGaw Declaration at 7.

67 *See* McGaw Declaration at 7.

68 *See* News Release, Verizon Wireless, *Verizon Wireless Announces Roll Out of National 3G Network,* Jan. 8, 2004, *at* http://news.vzw.com/news/2004/01/pr2004-01-07.html.

69 *See Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14804; Bob Brewin, *Sprint PCS Signs $1B Cell Network Upgrade Deal with Lucent,* COMPUTERWORLD, July 22, 2003, *available at* http://www.computerworld.com/mobiletopics/mobile/story/0,10801,83320,00.html?f=x68.

download utilizing GPRS versus 1.5 minutes utilizing EDGE and only 20 seconds utilizing 1xEV-DO.[70]

To compete with the new Verizon and Sprint offerings, Cingular and AWS must deploy a technology that permits data transmission at comparable speeds.[71] From a technology standpoint, the logical transition from EDGE is to the Universal Mobile Telecommunications System ("UMTS") which will initially permit data transmission at speeds of up to about 2 Mbps and eventually, when upgraded with High Speed Downlink Packet Access ("HSDPA"), at speeds of up to 10 Mbps.[72]

To deploy UMTS, a carrier must set aside a *minimum* of 10 MHz of dedicated spectrum (5 MHz uplink paired with 5 MHz downlink).[73] Because UMTS requires all customers in a sector to share the download bandwidth, a UMTS base station (prior to the introduction of HSDPA) that is capable of providing 384 kbps download speed to users at the outer boundary of service (up to 2 Mbps to close-in users) will only provide 38.4 kbps to 10 simultaneous users per sector.[74] Thus, additional UMTS channels will be needed to maintain adequate download speed as more subscribers demand access to 3G services.[75]

Because Cingular must continue serving subscribers using two different legacy technologies in addition to GSM/GPRS/EDGE, it will be unable to clear the minimum 10 MHz of spectrum necessary for the initial deployment of UMTS in most of its service area much less the substantially greater spectrum requirements necessary to serve anticipated demand for the high-speed services UMTS supports.[76] Even in the limited areas where Cingular has both a 25 MHz cellular system and a 10 MHz PCS system, there is no room for UMTS because the PCS system is already being used to serve GSM (and in some cases TDMA) subscribers. Thus, the

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70 *See* Dave Conabree, *Verizon to Unveil Ultra-Fast Wireless,* MOBILEMAG.COM, Mar. 17, 2003, *available at* http://www.mobilemag.com/content/100/104/C1549/; News Release, Verizon Communications, *Verizon Wireless to Offer High-Speed Wireless Broadband Services for Business Customers*, Mar. 17, 2003, *at* http://investor.verizon.com/news/ VZ/2003-03-17_X835726.html.

71 Verizon currently has no competition for data applications at these very high speeds. According to analyst Jane Zweig, Chief Executive of Shosteck Group, Verizon charges a premium for its advanced data service which would be unavailable if there was more competition. *See* Rob Pegoraro, *Verizon Wireless Lets You Get Online and Get Out – Quickly*, THE WASHINGTON POST, Mar. 14, 2004, at F7.

72 *See* Hogg/Austin Declaration at 5; UMTS World, WCDMA(UMTS), *at* http://www.umtsworld.com/technology/wcdma.htm (visited Mar. 16, 2004); UMTS World, HSPDA in W-CDMA, *at* http://www.umtsworld.com/technology/hsdpa.htm (visited Mar. 16, 2004).

73 Hogg/Austin Declaration at 10.

74 *Id.* Of course, the speed will increase if the 10 users are not continuously using their full share of the bandwidth. For example, 10 users browsing web pages will not all be downloading data or graphics at the same time, so a much larger number of users would be able to browse at high speeds than could download simultaneously.

75 *Id.* at 11.

76 *Id.* at 7, 11-12.

company has no clear 10 MHz of spectrum. Similarly, in the limited areas where Cingular only operates PCS systems, these systems utilize 20-30 MHz of spectrum to provide GSM/GPRS/EDGE service and do not have 10 MHz of clear spectrum within which to offer UMTS.[77] As a result of these constraints, Cingular alone would be able to introduce UMTS in only 38 metropolitan areas when the acquisition of additional NextWave spectrum is considered and with optimistic assumptions regarding the transition of analog and TDMA subscribers to GSM.[78] AWS suffers from similar constraints.[79]

As demonstrated in detail in the Hogg/Austin Declaration, where both companies have an existing customer base, the combined network will require 80 MHz to provide a full menu of competitive voice and data services. The post-merger company would require approximately 50 MHz of spectrum (assuming both carriers are currently using 25 MHz or more to serve their separate customer bases) to simultaneously serve the combined customer base with analog, TDMA, and GSM/GPRS/EDGE services and allow for anticipated growth in demand for existing services.[80] When the two companies' networks are fully combined and spectrum beyond this 50 MHz can be cleared, Cingular will be able to deploy UMTS in 10 MHz building blocks. Cingular anticipates that three 10 MHz UMTS blocks – for a total of 30 MHz – will be necessary to meet anticipated demand for 3G services.[81] Thus, the combined company will need up to 80 MHz of spectrum to meet the demand for existing voice and data services and meet the anticipated demand for advanced services.[82]

By combining the spectrum assets of both companies, Cingular will have sufficient spectrum to offer at least some UMTS in 75-80 of the top metropolitan areas and in many rural areas.[83] By allowing Cingular to obtain this spectrum, the Commission will create an additional provider of data service with a transmission rate of 2 Mbps or more and pave the way for the deployment of 3G services expeditiously and over a wider footprint.[84] This will increase competition in the provision of 3G services to a level that would not be possible without the merger and will provide consumers with additional choices for high speed connectivity.

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77 *Id.* at 12.

78 *Id.*

79 *See* Slemons Declaration at 2-4.

80 Hogg/Austin Declaration at 20. As discussed in the previous section, Cingular currently needs about 4 MHz to comply with the analog service requirement, about 11 MHz to provide TDMA service, and 10 MHz for Cingular's provision of GSM service, including GPRS/EDGE, to meet the demands of existing customers served via a 25 MHz system in urban areas. *Id.* at 7-8. The precise allocation of spectrum varies from area to area. *Id.*

81 *Id.* at 21.

82 In areas where the combined company would hold an attributable interest in more than 80 MHz throughout a BTA, it will reduce its holdings to no more than 80 MHz. The combined spectrum holdings of AWS and Cingular are provided in Attachment 8.

83 Hogg/Austin Declaration at 22.

84 *See* Press Release, Cingular Wireless, *Cingular To Acquire AT&T Wireless, Create Nation's Premier Carrier,* Feb. 17, 2004, *at* http://www.cingular.com/about/latest_news/04_02_17.

### C. The Merger Will Benefit Consumers by Making Cingular a Source for Truly Nationwide Coverage

The Commission has determined that the public interest is served by authorizing transactions that enable national CMRS carriers "to expand into new markets, and provide new services to subscribers and increase subscribership in markets in which [they] currently provide[] service."[85] The importance of achieving a nationwide footprint has been stressed by Thomas J. Hazlett, the former FCC Chief Economist:

> Gaining national geographic scope has allowed competing wireless networks to better pursue technological upgrades and to roll out a richer mix of services. The result is that the quality of wireless service has improved markedly with the emergence of wide area networks. . . . The integration of local systems into nationwide networks allowed for economies of scale in developing advanced applications and in deploying new technologies.[86]

Others have recognized that the expansion of Cingular's footprint is essential to its ability to provide nationwide service and to remain competitive with the other nationwide CMRS carriers:

> Analysts note this lack of coverage for Cingular . . . is preventing the carrier from presenting a true nationwide footprint and is hurting the carrier's attempt to compete.
>
> "When a customer walks into a store and sees on a map all the areas Cingular does not provide service, it creates doubt," said Eddie Hold, vice president of telecom services at Current Analysis. "Even if the customer will never travel out of their [sic] home calling area, the lack of a nationwide footprint could drive them away."[87]

Cingular was created in an attempt to provide consumers with another option for nationwide wireless service.[88] Although the company currently provides cellular and PCS service in 43 states[89] and has attributable interests in cellular/PCS licenses in 87 of the top 100

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85 *Applications of Northcoast Communications, LLC and Cellco Partnership d/b/a Verizon Wireless For Consent to Assignment of Licenses, Memorandum Opinion and Order,* 18 F.C.C.R. 6490, 6494 (2003) ("*Northcoast-VZW Order*"); *see, e.g., Cingular/NextWave* at ¶ 32.

86 *See* Thomas W. Hazlett, *Is Federal Preemption Efficient in Cellular Phone Regulation*?, 56 FED. COMM. L.J. 155, 202 (Dec. 2003).

87 *Cingular Continues Hunt for Nationwide Presence, supra* note 51.

88 *See* McGaw Declaration at 1-2.

89 *See* Cingular Wireless LLC, SEC Form 10-K, 2003 Annual Report at 2, Feb. 25, 2004, *available at* http://www.sec.gov/Archives/edgar/data/1130452/000095014404001647/0000950144-04-001647-index.htm.

metropolitan areas,[90] its competitors have a more expansive footprint. Verizon Wireless already provides service in 97 of the top 100 metropolitan areas,[91] Nextel provides service in all of the top 100 metropolitan areas,[92] and Sprint's footprint encompasses all 50 states.[93] After the transaction is consummated, Cingular's footprint will extend into 6 new states and Cingular will be able to offer service in 97 of the top 100 metropolitan areas.[94] It concurrently will expand its coverage from approximately 220 million licensed POPs to approximately 264 million.[95]

Cingular has entered into 114 roaming agreements to permit its subscribers to utilize their phones in areas unserved by Cingular. Similarly, AWS has entered into nearly 140 roaming agreements. By combining the networks and other infrastructure assets of Cingular and AWS, roaming charges – whether levied on subscribers or absorbed by the companies as part of certain pricing plans – will be eliminated in many areas. For example, AWS subscribers that currently roam in Portland, Oregon, Salt Lake City, Utah, and Tulsa, Oklahoma– three top 100 metropolitan areas – would no longer roam in those areas once the companies are combined. Similarly, Cingular does not provide facilities-based service in several major cities served by AWS, such as Denver, Colorado, Pittsburgh, Pennsylvania, Phoenix, Arizona, and Minneapolis, Minnesota.[96] After the merger, Cingular subscribers would not roam in these areas.

To eliminate coverage gaps quickly and extend its nationwide coverage, Cingular must acquire both spectrum *and* infrastructure.[97] Spectrum alone does not solve the coverage problem.[98] Without network assets and infrastructure to put spectrum to immediate use, improvements in coverage – as well as capacity and quality – will be delayed substantially.[99] By the time infrastructure is deployed, competitors will have expanded their coverage into other

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90 *See* Dan Meyer, *Cingular Banks on AWS with $41B Buy*, RCR WIRELESS NEWS, Feb. 23, 2004; Denise Pappalardo and Jim Duffy, *Cingular, AT&T Face Hurdles*, NETWORK WORLD, Feb. 23, 2004.

91 *See* Verizon Wireless Overview, *at* http://www.verizonwireless.com/b2c/aboutUs/index.jsp.

92 *See* Nextel History: December 2001, Nextel Communications, *at* http://www.nextel.com/about/corporateinfo/ company_history.shtml (noting that Nextel, with Nextel Partners Inc., serves the top 100 MSAs).

93 *See* Corporate Fact Sheet, Sprint Corporation, *at* http://www.sprint.com/sprint/ir/sd/cfs.html.

94 Lefar Declaration at 9. The three metropolitan areas remaining unserved will be Norfolk, Richmond and Newport News.

95 McGaw Declaration at 5.

96 *See* Lefar Declaration at 9. The merger should have little impact on the availability of roaming agreements to other carriers. Permitting the customers of other carriers to roam on the Cingular network produces valuable revenue for Cingular. Thus, with the exception of home roaming – which discourages competitors from building and expanding networks – Cingular will continue to enter into roaming agreements with other carriers.

97 McGaw Declaration at 3-4.

98 *Id.*

99 *Id.* at 3-4, 5, 8, 12-13.

areas and Cingular will remain behind its competition. By acquiring both spectrum and infrastructure, the company can provide expanded coverage to consumers in the near term.[100]

### D. The Transaction Will Result in Substantial Economies of Scale and Scope

In addition to improvements in network coverage and service quality, and greater availability of enhanced service offerings, the transaction will result in a number of synergies which will benefit consumers and make the new Cingular a more effective competitor. As a result of the merger, Cingular expects to generate operating and capital expense synergies of more than $1 billion in 2006 and more than $2 billion in subsequent years due to new economies of scale and scope created by the acquisition of AWS.[101] These economies of scale and scope include greater purchasing and billing system efficiencies and reductions in common expenses – such as network expansion expenses and maintenance and administrative costs.[102]

#### 1. Technical and Operational Efficiencies

By combining, the two companies will be able to achieve significant operating synergies by sharing best practices and consolidating networks, distribution, procurement, advertising, and other functions.[103] In areas where the two companies both provide service, they currently operate six networks (and each would require one more for UMTS, for a total of eight) and divide their spectrum accordingly. The combined company would be able to eliminate some redundancy in spectrum usage by consolidating the six current networks into three (analog, TDMA, and GSM/GPRS/EDGE) in any given area and by combining the spectrum into larger trunk groups. This would increase trunking efficiency, dramatically in many instances.[104] The new trunking efficiency will allow Cingular to offer service that is superior in quality to the service available from either company pre-merger, while also accommodating the growth of existing voice and data services for several years.

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100 Cingular and T-Mobile have entered into a limited infrastructure agreement. *See Eighth Annual CMRS Competition Report,* 18 F.C.C.R. at 14808. The merger has no impact on this agreement with T-Mobile. If either party eventually decides to terminate the relationship, there is a substantial transition period imposed by contract to afford the parties time to build infrastructure where they previously did not have such.

101 McGaw Declaration at 9; Andrew Ross Sorkin and Matt Richtel, *$41 Billion Offer by Cingular Wins AT&T Wireless*, N.Y. TIMES, Feb. 18, 2004, at A1. The Commission has recognized that "operators with larger footprints can achieve certain economies of scale and increased efficiencies compared to operators with smaller footprints." *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14805.

102 *See* McGaw Declaration at 9-11; *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14805.

103 *See generally* McGaw Declaration at 9-11.

104 For a more detailed explanation of the trunking efficiencies, *see* Hogg/Austin Declaration at 13-19; *see also* McGaw Declaration at 6; Slemons Declaration at 3-4.

### 2. Greater Scope and Scale for Customer Handset Functionality

Another benefit of the merger is that the combined company will be able to work with device manufacturers to customize device interfaces to Cingular's service offerings. Potential examples could include a button on a phone that allows one-touch access to a customer's current minute or account balance.[105] This approach has proven very popular internationally and has been used to differentiate products in the marketplace.[106] Absent the merger, neither Cingular nor AWS sells a sufficient number of handsets to warrant this type of arrangement with device manufacturers.[107]

Further, because both companies utilize the same wireless technologies, the networks can be integrated rapidly, thereby allowing the combined company to implement new features quickly. The merger also would increase the size of the customer base, thereby permitting the combined company to more quickly justify the development and deployment of new products and services such as multimedia messaging, digital music, interactive gaming, graphics-intensive web surfing, longer downloadable video clips (*e.g.*, news, music, and sports clips), the ability to stream full-motion video content on demand, and integrated cameras with higher resolution picture images.[108] Absent the merger, the customer base of each company may not justify the rapid deployment of such new products. The combined company's larger customer base and enhanced purchasing power will also enhance its ability to acquire and provide to consumers a broader selection of equipment at more competitive prices.[109]

### 3. Synergies from Combined "Best Practices"

Both Cingular and AWS have developed a series of practices designed to meet customer needs and to comply with regulatory mandates. The merger will allow the combined company to take advantage of the best practices each has developed. For example, in the course of forming Cingular, nearly a dozen separate billing operations were consolidated into two scalable systems which significantly reduced billing costs per subscriber. Cingular also merged sixty separate customer service call centers into twenty more responsive mega-centers, making it more qualified to address customer service issues. Cingular's wireless local number portability ("WLNP") practices have resulted in some of the lowest transition complaints in the industry, and Cingular is also a leader in addressing wireless disability issues. AWS has developed marketing practices and expertise in serving an extensive business customer base that will benefit the combined company.[110]

## E. The Transaction Will Enhance Homeland Security and Public Safety

Both AWS and Cingular intend to provide WPS to key national security and emergency preparedness ("NS/EP") personnel during disaster and emergency situations. The subject

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105 Lefar Declaration at 11.

106 *Id.* at 11-12.

107 *Id.* at 12.

108 *See* McGaw Declaration at 7.

109 *Id.* at 9.

110 *See generally id.* at 8-9.

transaction will improve homeland security by facilitating a faster, more widespread deployment of WPS. Moreover, instead of deploying a WPS solution on two networks, both with coverage gaps, WPS can be rolled out on a single network with greater depth and breadth of coverage and substantially higher capacity.

In emergency situations, wireless networks experience extreme congestion. The additional capacity that will result from the subject transaction in areas where both companies currently hold licenses will alleviate congestion on the Cingular network during such situations and provide increased WPS capacity. This will allow Cingular to implement WPS in the manner in which it was intended: "serv[ing] national security and emergency preparedness needs while minimizing the impact on consumer access to the same infrastructure."[111]

Because the transaction involves the combination of existing networks, it also increases the likelihood for diversified routing, greater redundancy and increased reliability in both the signaling and data networks. This will improve the ability of Cingular's wireless network to function if certain assets are destroyed or damaged in an emergency; the diversified routing will provide a measure of redundancy that will increase the potential for call completion. In addition, by improving coverage, the battery life of public safety handsets utilizing the network during a crisis will be extended because the handset is likely to be closer to a tower.[112] Network survivability and restoration capabilities also will be increased by the proposed transaction. The additional spectrum available in areas where the two companies overlap – when combined with the frequency hopping capabilities inherent in GSM – will make the network more resilient against interference and jamming.[113]

Approval of Cingular's acquisition of AWS also will benefit public safety.[114] As the Commission is well aware, the "expansion of the CMRS systems, particularly SMR systems and cellular networks, using digital technology and employing more intensive frequency reuse has apparently caused interference on the public safety channels."[115] By granting the subject applications, the Commission will alleviate spectrum constraints faced by Cingular in many

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[111] Dept. of Homeland Security, National Communications System, Wireless Priority Service Fact Sheet, *at* wps.ncs.gov/documents/WPS%20Fact%20Sheet%2025Mar03.pdf.

[112] The closer a handset is to a tower, the lower the transmit power necessary to reach the tower and transmit power is the biggest consumer of battery power.

[113] This transaction will have no impact on the combined company's CALEA responsibilities. Cingular has worked diligently with law enforcement to implement CALEA capabilities throughout its network and has consistently kept the FBI's Electronic Surveillance Technology Section apprised of its progress. The merger will in no way undermine these efforts, nor the efforts that AWS has expended to date. Once the merger is effectuated, Cingular will be able to evaluate AWS CALEA capabilities and the networks of both companies can be brought under a unified approach for CALEA compliance.

[114] The transaction will have no impact on the Enhanced 911 consent decrees held by both companies. Under these decrees, Cingular and AWS will face identical requirements by the time the transaction is consummated or shortly thereafter.

[115] *Applications of Chadmoore Wireless Group, Inc. and Various Subsidiaries of Nextel Communications, Inc.; For Consent to Assignment of Licenses, Memorandum Opinion and Order*, 16 F.C.C.R. 21105, 21110 (WTB 2001) ("*Chadmoore*").

areas. This will positively affect public safety because the additional frequencies will allow Cingular "to react in a more flexible manner if its operation did affect public safety licensees."[116] The Commission has previously concluded that this "constitute[s] [a] transaction-specific public interest benefit[]."[117]

## III. THE PROPOSED TRANSACTION WILL NOT HARM COMPETITION

When the Commission eliminated the spectrum cap, it emphasized that its case-by-case review would seek to achieve the same objective as the former rule – namely, "to 'discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency.'"[118] As discussed above, this merger will unquestionably promote efficiency and innovation and will not have anticompetitive affects. To the contrary, the proposed transaction will promote more effective competition.

### A. Wireless Telephony Markets Are and Will Remain Robustly Competitive

The wireless industry in the United States is a model of vigorous and dynamic competition. As the Commission found just last year in its *Eighth Annual CMRS Competition Report*:

> Continued downward price trends, the continued expansion of mobile networks into new and existing markets, high rates of investment, and churn rates of about 30%, when considered together with the other metrics, demonstrate a high level of competition for mobile telephone consumers.[119]

The "other metrics" referred to in the *Eighth Report* included steadily declining prices and greatly expanded output and usage of mobile telephone services.

This transaction will do nothing to diminish the vigor of this competition which has benefited consumers throughout the country. To the contrary, by allowing Cingular and AWS to overcome some of the limitations that each faces as an independent carrier, it will strengthen competition and provide more and better service and faster provision of advanced services than would otherwise be possible. One of the key observations made by the Commission in the *Eighth Annual CMRS Competition Report* was that "while there are several large, established carriers in the CMRS industry, they have no guarantee of maintaining their market share, and they are faced with consumers that would readily leave carriers that attempted to raise prices or diminish service quality."[120] There is abundant evidence to support this conclusion.

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116 *Id.* at 21112.

117 *Id.*; *see Keller Communications, Inc. v. FCC*, 130 F.3d 1073, 1076-77 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 954 (1998).

118 *2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services, Report and Order*, 16 F.C.C.R. 22668, 22695 (2001) ("*2000 Biennial Regulatory Review*").

119 *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14812.

120 *Id.* at 14786.

The history of the wireless industry demonstrates that, as new carriers have entered and built-out their networks, they have rapidly gained customers and market share. T-Mobile doubled its share between 2000 and 2003[121] while Metro PCS announced last month that its 2003 revenue almost quadrupled versus 2002.[122] Whatever "advantage" the legacy cellular carriers may once have had has long since disappeared as a result of the successful entry and expansion of PCS carriers. Today, consumers perceive no difference among cellular, PCS or SMR service provided by such carriers as Nextel and Southern LINC.

Net subscriber additions also demonstrate the highly competitive nature of the industry. Professor Gilbert analyzed data for each of the national carriers between 2000-2004 and concluded that new entrants are taking substantial market share from original providers such as Cingular and AWS.[123] As Professor Gilbert notes, "[t]he aggregate positions of both Cingular and AWS have been eroding over the past few years and the pace of this erosion has accelerated."[124] Market penetration emphasizes the importance of this metric – over the next ten years, wireless penetration is expected to grow from 53% to 75% domestically.[125]

In addition, the high rate of customer switching, or "churn," in this industry indicates that carriers have no particular ability to retain their customers if they are not providing competitive pricing, service, and features. Indeed, U.S. wireless carriers lose approximately one-third of their customers each year.[126] And that was before the introduction of WLNP in November 2004. Prior to WLNP, approximately 40% of customers cited "don't want to change my current phone

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121 Gilbert Declaration at 5.

122 *See* MetroPCS, SEC Form 8-K, Feb. 25, 2004, *available at* http://www.metropcs.com/investor/200304.pdf.

123 Gilbert Declaration at 5-8.

124 *Id.* at 8. Some analysts predict that the combined company could lose the top ranking in terms of subscribers within a short time. *See* Chris Nolter, *You Call This Consolidation?*, DAILY DEAL, Feb. 19, 2004, at M&A Section (noting that Verizon's "organic growth is so darn good that they're going to pass Cingular eventually"); Yankee Group, *Cingular Acquires AT&T Wireless, Devours the Competition* (predicting that "[e]ven if Cingular/AT&T Wireless does not falter in adding subscribers, Verizon Wireless will surpass them in less than 3 years), *at* http://www.yankeegroup.com/public/home/daily_viewpoint.jsp?ID=11299; Shawn Young, *Cingular's Next Challenge: Rivals Could Take Advantage of Any Disruptions in Merger With AT&T Wireless Services,* WALL ST. J. Feb. 18, 2004, at B1 (citing Roger Entner, Analyst, Yankee Group).

One expert even predicted that the market share of the combined company might not rank first by the time the deal is approved. Jennifer Davies, *Cingular Wins Bidding for AT&T Wireless*, SAN DIEGO UNION-TRIBUNE, Feb. 18, 2004, at A-1 (quoting Michael King, Wireless Industry Analyst, Gartner Group). Although Cingular does not endorse these views, they indicate the intensely competitive nature of the industry.

125 *See* Cingular Wireless and AT&T Wireless, *New Leadership for the U.S. Wireless Industry*, at 6, *at* http://www.cingular.com/about/ new leadership.pdf.

126 *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14801; Gilbert Declaration at 3.

number" as one of their reasons for not changing carriers.[127] With the advent of WLNP, this impediment to a customer leaving its existing carrier in pursuit of better pricing or better service is gone. Thousands of customers are taking advantage of this opportunity, and Cingular and AWS have some of the highest churn rates in the industry.

| Carrier | Churn Fourth Quarter 2003 |
|---|---|
| Nextel | 1.5 percent[128] |
| Verizon Wireless | 1.7 percent[129] |
| Sprint PCS | 2.7 percent[130] |
| Cingular | 2.8 percent[131] |
| T-Mobile USA | 3.2 percent[132] |
| AT&T Wireless | 3.3 percent[133] |

The market is comprised of six well-established nationwide carriers – AWS, Cingular, Nextel, Sprint, T-Mobile, and Verizon Wireless – and a number of large regional players, including ALLTEL Corp., Western Wireless Corp., United States Cellular Corp., and Dobson Communications Corporation ("Dobson").[134] There are also numerous smaller competitors who play important roles in the competitive environment. For example, in the Miami area, Metro PCS has been a particularly successful recent entrant whose low-priced offerings have proved very attractive to a significant segment of the population.

After the transaction, there will still be five national competitors as well as a substantial number of regional and local competitors.[135] In an industry in which customers can and do switch carriers frequently and easily, and in which new entrants have experienced little difficulty in rapidly expanding, there is no question that vigorous competition will continue after this merger. The merger will not result in higher prices; indeed, one analyst noted that "[g]oing from six to five competitors will have no impact on calming the pricing war in the long term" and in the short term may actually lead to steeper price cuts.[136] As Verizon Communications' Senior

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127 *See* Ex Parte of Telephia in WT Docket No. 01-184 (Jan. 22, 2002) at 1.

128 *Nextel Report Higher 4th-Quarter Revenue, As Profit Drops*, WASHINGTON TELECOM NEWSWIRE, Feb. 19, 2004.

129 *Churn, Churn, Churn*, WIRELESS WEEK, Feb. 1, 2004, *available at* http://www.wirelessweek.com/article/CA478478?ticker+NXTL&type=stockwatch.

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 *See Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14805.

135 A list of competitors in each BTA involved in this transaction is set forth at Attachment 9.

136 Matt Richtel, *A $41 Billion Telephone Deal, but What's in It for Consumers*, N.Y. TIMES, Feb. 18, 2004, at C1 (quoting Eddie Hold, Telecommunications Industry Analyst, Current Analysis).

Vice President for Public Policy and External Affairs stated, "[c]onsolidation won't stop the price wars, but it will give carriers an opportunity to . . . deliver better service at lower costs."[137]

As discussed below, competition to provide mobile voice and data services will be strengthened, not lessened, as a result of the transaction. The merger will have no adverse impact on competition, whether or not voice and data services are viewed separately or as a single market, nor will there be any harm to competition in other potential alternative product markets. The same forces that govern competition in the market for mobile telephony services are at work in these alternative potential markets. Finally, the transaction will have no adverse effect on competition between wireless and wireline telecommunications services.

### B. Relevant Product Market

In defining the relevant product market, the Commission includes all services that are a reasonable substitute for each other in the eyes of consumers – even if the products are not identical.[138] The relevant market clearly includes cellular, PCS and SMR carriers such as Nextel and Southern LINC who provide service that is substantially identical to other CMRS carriers because neither consumers nor carriers distinguish wireless services based on the type of technology utilized.[139] As the Commission has noted, "from a customer's perspective, digital services in the cellular or SMR band is virtually identical to digital service in the PCS band."[140]

In analyzing transfers and assignments involving cellular and PCS licenses, the Commission has concluded that the relevant market is "all commercially available two-way, mobile voice and data services providing access to the public switched telephone network via terrestrial systems."[141] The Commission similarly recognized that "mobile voice and mobile data services are no longer clearly delineated in the marketplace."[142] In the recent *NextWave*

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137 Anne Marie Squeo, *Regulators Are Likely to Clear Cellphone Deal*, WALL STREET JOURNAL, Feb. 18, 2004, at A11 (quoting Thomas Tauke, Senior Vice President – Public Policy and External Affairs, Verizon Communications).

138 *See Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp. (Transferors) and EchoStar Communications Corp. (Transferee), Hearing Designation Order*, 17 F.C.C.R. 20559, 20606 (2002) ("*EchoStar/Hughes*"); *accord* Gilbert Declaration at 14.

139 Gilbert Declaration at 15. In addition, the relevant market may include other interconnected mobile voice services, such as those provided by mobile satellite services. As the Commission noted, providers of cellular, PCS, and MSS "offer mobile telephone services that are *essentially interchangeable from the perspective of most consumers. . . .*" *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14804. Inclusion of MSS services in the relevant market does not, however, result in meaningful changes in the level of market concentration, and we thus do not discuss them further.

140 *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Seventh Report,*17 F.C.C.R. 12985, 12993 (2002) (emphasis added) ("*Seventh Annual CMRS Competition Report*").

141 *Cingular/NextWave* at ¶ 29.

142 *Eighth Annual CMRS Competition Report,* 18 F.C.C.R. at 14792.

order, the Commission defined a market for mobile telephony that included both voice and data services.[143]

Professor Gilbert believes that the market for wireless voice services may be distinct from the market for wireless data services, but believes that the same analysis applies and the same conclusions are reached regardless of whether voice and data are part of the same market because largely the same competitive forces are at work with regard to both voice and data.[144]

All of the national wireless carriers offer or have announced that they intend to offer mobile data services.

- By the end of 2002, Nextel had overlaid its iDEN network with a packet network in order to offer data services.[145] Nextel's "Packetstream Gold service" reportedly uses advanced compression technology to increase transmission speeds up to 56 Kbps.[146] In November 2003, Nextel announced that it plans to adopt "Motorola's WiDEN higher speed data technology, which is designed to quadruple data speeds."[147] Nextel expects to deploy the network infrastructure equipment and software necessary to operate the WiDEN technology in the second half of 2004.[148] Following a smaller test last year, Nextel reportedly continued to test Flarion Technologies' FLASH-OFDM, which supports data rates up to 2 Mbps.[149]
- Sprint PCS began offering 2.5G data service in August 2002 using 1xRTT technology, which the carrier deployed across its entire network. Sprint plans to roll out 3G services using 1xEV-DV in 2005 or 2006.[150]

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143 *Cingular/NextWave* at ¶ 29.

144 Gilbert Declaration at 17-19.

145 *See Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14819-20 & n.258.

146 Lee Gimpel, *Defining 2.5G and 3G Networks: Has Wi-Fi Stolen the 3G Show?*, WIRELESS BUS. & TECH., Dec. 1, 2003, *at* http://www.sys-con.com/ wireless/article.cfm?id=708 ("*Defining 2.5G and 3G Networks*").

147 Nextel History: November 2003, Nextel Communications, *at* http://www.nextel.com/about/corporateinfo/company_history.shtml.

148 News Release, Nextel Communications, *Nextel to Deploy Higher Speed Data Technology; WiDEN Designed to Quadruple Packet Data Speeds*, Nov. 14, 2003, *at* http://phx.corporate-ir.net/phoenix.zhtml?c=63347&p=irol-ewsArticle&t=Regular&id=470345& (noting that Nextel Executive Vice President and Chief Operating Officer Tom Kelly added that Nextel continues to evaluate capabilities, customer demand and cost efficiencies of broadband technologies); *Nextel Plans to Upgrade to WiDEN*, RCR WIRELESS NEWS, Nov. 17, 2003, *available at* http://www. rcrnews.com/cgi-bin/news.pl?newsId=15944.

149 *See Nextel Gets Flashier With Flarion*, UNSTRUNG, Dec. 10, 2003 *at* http://www.unstrung.com/document.asp?doc_id=44729.

150 *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14820-21; *see also* Sam Omatseye, *Verizon to Extend EV-DO's Reach*, RCR WIRELESS NEWS, Jan. 12, 2004 ("*EV-DO*

(continued)

- T-Mobile claims to be the first U.S. carrier to launch a 2.5G wireless data services across its entire network.[151] T-Mobile currently offers GSM/GPRS, and plans to roll out EDGE.

- Verizon Wireless has completed 1xRTT upgrades in a total of 900 towns and cities.[152] On October 1, 2003, Verizon Wireless launched service over 1xEV-DO networks (with data rates of approximately 300 Kbps to 500 Kbps) in Washington, D.C. and San Diego.[153] Verizon Wireless plans to spend $1 billion to launch EV-DO service in other major cities in 2004, and expects service to be available by the summer of 2004.[154]

In addition, many of the same data services are offered by the regional and local carriers. There are also data-only providers who offer additional competition in this market and whose competitive incentives and strategies are very different from carriers who also provide voice services.[155] The same conditions that make unilateral or coordinated anticompetitive effects unlikely in mobile voice services apply equally in a market for mobile data services. Indeed, there is greater heterogeneity in the various carriers' offering and pricing of mobile data service than there is in mobile voice services, further reducing the prospect of anticompetitive coordination. Accordingly, the impact of the merger should not be evaluated in terms of a separate mobile data market.

### C. Relevant Geographic Market

The relevant geographic market is "the area in which buyers practically can turn for alternative sources of supply, or in which there are sellers who act to restrain the prices charged to those buyers."[156] In the context of mobile services, "the geographic scope of competition in the provision of wireless calling plans should be analyzed as national."[157]

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(footnote continued)
*Reach*"); *Defining 2.5G and 3G Networks, supra* note 146 (reporting that peak EV-DV speeds are expected to be near 3 Mbps).

151 *See* T-Mobile USA, SEC Form 10-K, 2002 Annual Report at 7, Mar., 11, 2003.

152 *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14820.

153 Press Release, Verizon Wireless, *Wireless Broadband Data Service Introduced in Major Metro Areas,* Sept. 29, 2003 *at* http://investor.verizon.com/news/VZ/ 2003-09-29X335914.html.

154 *See EV-DO Reach, supra* note 150.

155 *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14867. For example, Cingular's wholly-owned subsidiary, Cingular Interactive, offers information services over a high speed data network utilizing dedicated SMR spectrum. AWS does not offer stand-alone information services and expressed no desire to enter the "data-only" market (to the extent one exists). Thus, the transaction has no impact on competition in a hypothetical market for data-only services. *See VSTR/DT Order*, 16 F.C.C.R. at 9825 n.236. Moreover, if viewed as a separate market, the transaction will increase competition in mobile data services by making it possible for the merged firm to introduce advanced 3G services to more consumers more quickly than either could do independently. *See supra* Section II.B.

156 *BellAtlantic Mobile Systems, Inc. and NYNEX Mobile Communications Company Application For Transfer of Control of Eighty-two Cellular Radio Licenses to Cellco*
(continued)

Historically, the Commission has regarded wireless telecommunication markets as local in nature. In large part, that was due to the fact that cellular licenses were originally awarded on a localized basis – MSAs and RSAs.[158] Service plans allowed subscribers to make calls within a relatively small geographic area for one price. When a subscriber attempted to place a call from beyond this "home" area, the subscriber would pay higher "roaming" fees.[159]

By the early 1990s, however, the Commission recognized that the cellular licensing areas no longer represented the appropriate geographic boundaries for mobile voice services and adopted larger service areas – Metropolitan Trading Areas ("MTAs") and Basic Trading Areas ("BTAs"). The Commission noted that cellular MSAs and RSAs had been consolidated by licensees to form larger "home" calling areas and thus concluded that use of these license areas for market definition would result in the "*unnecessary fragmentation of natural markets.*"[160]

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(footnote continued)

*Partnership, Order,* 10 F.C.C.R. 13368 (WTB 1995) (citing *U.S. v. Phila. Nat. Bank*, 374 U.S. 321, 359 (1963)) ("*BellAtlantic/NYNEX*"), *aff'd* 12 F.C.C.R. 22280 (1997); *accord 2002 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking,* 18 F.C.C.R. 13620, 13716 (2003) (noting the "Supreme Court's definition of the relevant geographic market as the region 'in which the seller operates, and to which the purchaser can practicably turn for supplies.' *United States v. Grinnell Corp.*, 348 U.S. 563, 588-89 (1966)").

157 Gilbert Declaration at 19. The Supreme Court has stated that "the relevant market . . . is not the several local areas which the individual stations serve, but the broader national market that reflects the reality of the way in which they build and conduct their business." *Grinnell Corp.*, 384 U.S. at 576. This decision has been used to establish a framework for evaluating whether there is a national market for mobile telephony:

> [E]vidence [of a nationwide market] might consist of a large portion of the sales of the relevant product being made to regional or nationwide customers; providers adopting nationally centralized management or operations, or setting rates on a nationwide basis; a large percentage of current sales of portable units as opposed to car-bound units; a major proportion of traffic being roamer traffic . . .; or widespread subscription to regional or national service options.

*BellAtlantic/NYNEX*, 10 F.C.C.R. at 13375 n.28 (citing *Grinnell Corp.*, 384 U.S. at 575-76).

158 47 C.F.R. § 22.909.

159 *See* Gilbert Declaration at 20.

160 *Amendment to the Commission's Rules To Establish New Personal Communications Services, Report and Order,* 8 F.C.C.R. 7700, 7732 (1993) (emphasis added); *see Policy and Rules Concerning the Interstate, Interexchange Marketplace, First Memorandum Opinion and Order on Reconsideration,* 12 F.C.C.R. 11812 (1997) ("*Rate Integration Recon.*") (emphasis added); *Policy and Rules Concerning the Interstate Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended; Petitions for Forbearance, Memorandum Opinion and Order,* 14 F.C.C.R. 391, 401 (1998).

By the mid-1990s, alterations in cell phone design and marketing further expanded the areas in which consumers expected to make "home" calls. Wireless phones initially were very bulky and most were designed for permanent in-vehicle installation.[161] These phones evolved into streamlined handsets that could be taken anywhere. In-vehicle mobility was replaced with "anytime, anywhere" mobility.[162] This handset evolution accelerated the need for carriers to expand home calling areas.

This new "anytime, anywhere" demand for mobility moved the regional MTA-wide focus into nationwide competition. In May 1998, AWS began offering "one rate" pricing plans.[163] Thereafter, virtually every major carrier began offering similar national pricing plans and began building nationwide networks.[164] Since the introduction of the Digital One-Rate plan, there has been a steady shift of consumers away from buying local wireless service and paying often steep long distance and roaming charges. Instead, customers increasingly buy national rate plans that charge a single rate for every minute of use, whether for a call across the street or across the country, whether at home or on the road.

Every wireless carrier now offers and heavily promotes various national rate plans, and customers have flocked to such plans.[165] Nationwide rate plans outsell all other rate plans, a trend that is expected to accelerate.[166] Cingular believes that more than 70% of Verizon's new customers are on national plans,[167] and it is Cingular's goal to have a substantial majority of its new customers on national plans by the end of the year.[168]

One of the essential characteristics of a national rate plan is that it is offered at a single price for a given package. Carriers price their national plans uniformly across the nation.[169] That is, a Cingular customer buying a 600 minute national plan will pay the same price whether

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161 *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, First Report*, 10 F.C.C.R. 8844, 8851 (1995) ("*First Annual CMRS Competition Report*"); Lefar Declaration at 6.

162 *First Annual CMRS Competition Report*, 10 F.C.C.R. at 8851; *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Second Report*, 12 F.C.C.R. 11266, 11281 & n.50 (1997); *see* Gilbert Declaration at 20-21.

163 *See Seventh Annual CMRS Competition Report*, 17 F.C.C.R. at 13014. In 2001, the Commission sunset the 55 MHz spectrum but retained the cellular cross-ownership rule in RSAs because cellular licenses had been granted much earlier than PCS, not because RSAs represented the relevant market for mobile services. *2000 Biennial Regulatory Review,* 16 F.C.C.R. at 22695-96.

164 *See Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14805-06; *USA – Wireless Overview, supra* note 57, at 7-8.

165 LeFar Declaration at 6; McGaw Declaration at 2; Sievert Declaration at 1-3.

166 LeFar Declaration at 6; *see* Sievert Declaration at 3.

167 Gilbert Declaration at 22.

168 *Id.*; *see also* Lefar Declaration at 6.

169 A few minor variations are discussed in the Gilbert Declaration at 34-35.